

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 55880-40A BY DANIEL DEBUFF)

* * * * *

The time period for filing exceptions to the Hearing Examiner's Proposal for Decision in this matter has expired. No timely exceptions were received from any party of record. Therefore, having given the matter full consideration, the Department accepts and adopts the Findings of Fact and Conclusions of Law of the Hearing Examiner as contained in the November 9, 1987 Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon these Findings of Fact and Conclusions of Law, and all files and records herein, the Department makes the following:

ORDER

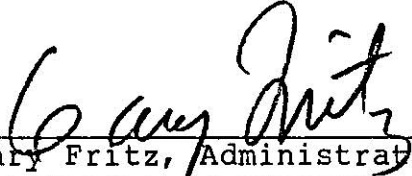
Application for Beneficial Water Use Permit No. 55880-40A by Daniel DeBuff hereby is denied without prejudice.

CASE # 55880

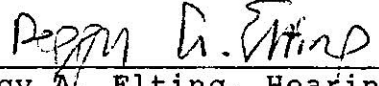
NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 1st day of December, 1987.



Gary Fritz, Administrator
Department of Natural
Resources and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6605



Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
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CASE #55880

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was served by mail upon all parties of record at their address or addresses this 3rd day of December, 1988, as follows:


Daniel G. DeBuff
Box 77
Shawmut, MT 59078

Estate of Bertha C. Muller
A. F. Muller
Box R
Bridger, MT 59014

Hellen I. Warner
Judith Gap, MT 59453

Joseph Pirrie
Shawmut, MT 59078

Sam Rodriguez, Manager
Water Rights Bureau
Lewistown, MT 59457
(inter-departmental mail)


Susan Howard
Hearings Reporter

CASE # 55880

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 55880-40A BY DANIEL DEBUFF)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on March 24, 1987, in Harlowton, Montana.

Daniel DeBuff, the Applicant in this matter, appeared in person.

Objector Estate of Bertha C. Muller was represented at the hearing by A.F. Muller.

Objector Joseph Pirrie appeared at the hearing in person.

Objector Hellen Warner appeared at the hearing in person.

Sterling Sundheim, Engineer with the Lewistown Water Rights Bureau Field Office, appeared as a staff witness for the Department of Natural Resources and Conservation (hereafter, the "Department").

Brian Harrison, Hydrogeologist with the Department, also appeared as a staff expert witness.

EXHIBITS

The Applicant did not offer any exhibits for inclusion in the record in this matter.

The Objectors did not offer any exhibits for inclusion in the record in this matter.

The Department offered four exhibits for the record:

Department Exhibit 1 is a report written by Sterling Sundheim, dated June 29, 1984, which details a complaint which Objector Hellen Warner filed with the Lewistown Water Rights Bureau Field Office concerning the Applicant's capture and use of water.

The Applicant objected at the hearing to admission of this exhibit on the basis that his appropriation was not the reason for the Objector's water problems as alleged in the report. Exhibit 1 was accepted for the record with the stipulation that the assertions set forth in the report are understood to be the Objector's allegations, and not part of a factual determination by the Field Office.

Department Exhibit 2 is a report written by Sterling Sundheim after field investigating the complaint filed by Hellen Warner. (Three-page memorandum, photocopy of aerial photograph of the area, two pages of flow measurements, ten photographs. Report dated July 23, 1984.)

Department Exhibit 3 is a report by Brian Harrison, describing an October 23, 1985 field investigation made by Mr. Harrison and Mr. Sundheim in response to the complaint filed by Hellen Warner against the Applicant. (Three-page memorandum, dated November 1, 1985.) Two legal land descriptions were corrected by Mr. Sundheim at the hearing, and marked in red ink on the exhibit.

Department Exhibit 4 consists of five large sheets of paper which bear illustrations accompanying Brian Harrison's testimony at the hearing. The drawings were made by Mr. Harrison as he testified, for illustrative purposes.

Department Exhibits 2, 3, and 4 were accepted for the record without objection. The Department file, which contains the originals of the Application and the Objections, correspondence between the Department and the parties, Department reports and processing documents, Sterling Sundheim's September 9, 1986 Field Report and Brian Harrison's January 22, 1986 Hydrogeology Memorandum, was made available at the hearing for review by all parties. No party made objection to any part of the file. Therefore, the Department file in this matter is included in the record in its entirety.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. MCA Section 85-2-302 states, in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department." The exceptions to permit requirements listed in §85-2-306 do not apply in the present matter.

2. Application for Beneficial Water Use Permit No. 55880-40A was duly filed with the Department of Natural Resources and Conservation on May 9, 1984 at 2:00 p.m.

3. The pertinent portions of the Application were published in the Times-Clarion, a newspaper of general circulation in the area of the source, on November 22 and 29, 1984.

4. The source of water for the proposed appropriation is groundwater.

The Application and the Department reports in this matter describe the water in question as groundwater, although the relatively shallow depth (5 feet or less, according to the parties) indicates that some tributary surface water may be involved. However, on the basis of the hydrogeology report (see Brian Harrison's January 22, 1986 Report) and the Applicant's testimony that the water is spring water which comes to the surface and then percolates down to a confining layer of clay where his tile drain system captures it, the source of water for purposes of this matter will be designated to be groundwater.

5. The Applicant initially requested a permit for 1,000 gpm up to 285.12 acre-feet of water per year, for new sprinkler irrigation of 162 acres as stated in the public notice in this matter. On April 11, 1986, the Applicant amended his Application downward to 500 gpm up to 141.2 acre-feet of water per year, for new sprinkler irrigation of 80 acres.

The Application as amended requests 500 gpm up to 141.2 acre-feet of groundwater per year, to be diverted by means of a dam for new sprinkler irrigation of 26 acres in the NW $\frac{1}{4}$ of Section 35, and 54 acres in the NE $\frac{1}{4}$ of Section 34, Township 10 North, Range 17 East, Wheatland County, Montana. The Application also requests a storage reservoir with an on-stream capacity up to 24.00 acre-feet, with an appropriation period of January 1 through December 31.

Testimony at the hearing disclosed that the Applicant's means of diversion actually consists of tile drain systems which capture subsurface water and bring it to the surface where it is impounded, rather than the water being diverted by means of a dam as described in the Application and public notice. However, testimony indicates that the area residents were aware of the nature of the Applicant's project (see, e.g., Department Exhibits 1 and 2), and that the lack of clarity in the public notice did not unduly prejudice any party or potential party.

6. The Applicant developed a tile drain system to capture groundwater, and filed a Notice of Completion of Groundwater Development (November 3, 1983). He received a Certificate of Water Right for 99 gpm up to 80.48 acre-feet of water from a diversion point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 35, Township 10 North, Range 17 East: 99 gpm up to 77.48 acre-feet of water for irrigation of 100 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 35, and 99 gpm up to 3.00 acre-feet of water for stockwater in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 35, all in Township 10 North, Range 17 East, Wheatland County, Montana. (Certificate of Water Right No. 53490-g40A.)

Subsequent to issuance of the Certificate of Water Right, the Applicant expanded his appropriation by constructing a third tile drain line and by extending the length of one of the original lines. (See July 23, 1984 Memorandum and September 9, 1986 Field Report by Sterling Sundheim.) He now wishes to expand his collection pond from an approximately one acre-foot pond, used as a sump for his irrigation system, to a 24 acre-foot reservoir to be

used for storage. As a result of the increased flow and volume and the desired changes, the Applicant filed the present Application. (Testimony of Applicant.)

The Applicant's collection system consists of approximately 4,000 linear feet of 4-inch and 6-inch tile, laid five to six feet below the ground surface. The tile lines follow the aquifer "on grade", and eventually come to the surface, where they discharge the water into ditches which feed into the collection pond. (Testimony of the Applicant.)

The Applicant testified that the storage reservoir would be constructed with a drain pipe at the bottom of the retaining dam, and an overflow pipe and emergency spillway installed to handle high water. The reservoir would be sited so that when the reservoir was full, the water level will cover the tile lines and stop the flow. The proposed location for the reservoir is at the head of the drainage (Cold Spring Creek), above Objectors Mullen and Pirrie.

7. The 500 gpm flow rate requested in the Application refers to the rate at which the Applicant intends to divert water out of the reservoir, not to the flow which the drain system yields, although the Applicant estimated that the system runs, "at a guess", in excess of 500 gpm during runoff.

The Applicant testified that the tile drain system yielded a flow of 80.9 gpm during dry times, but that he expected the normal flow to be over 100 gpm. The system yields flows year round, with the measured 80.9 gpm probably representing the minimum flow.

(Testimony of Applicant. See Department Exhibit 2.) The Applicant stated that this water can be put to beneficial use throughout the

requested period of appropriation if it is made available through storage. His present sprinkler system requires 325 gpm, with an estimated maximum development of 500 gpm. (Testimony of Applicant.)

8. The Objectors testified that they believe the Applicant's proposed enlargement of his appropriation will adversely affect their water rights by reducing the amount of water available to meet their irrigation and stockwater uses.

Hellen Warner has a Certificate of Water Right, with a 1976 priority date, for a developed spring diversion made by means of a 3½-foot diameter culvert which has been set 6 feet deep into the ground, with perforations to collect water. The water gravity feeds through a pipe into a stock tank. (See Department Exhibit 2.) Mrs. Warner testified that in 1984 her spring had gone dry, and that she has had problems with water availability ever since. She kept records of the water level in her diversion (culvert) in May and June of 1985, beginning with a water depth of approximately 2 feet, 2¾ inches (3 feet 9¼ inches from top of culvert) and ending when the culvert went dry on June 30. She stated that she believes the Applicant's diversion system affects the spring by reducing the level of the aquifer in the area.

Joseph Pirrie testified that he does not object to the Applicant diverting direct flow, but that he objects to the proposed storage of water, especially during the irrigation season, because he believes the water would otherwise supply downstream springs which are the source of water in the drainage. Mr. Pirrie stated that he did not agree with the hydrogeology report (January 22, 1986 Report by Brian Harrison), because his own years of experience with the

geology of the area lead him to believe that it is not possible to accurately estimate the geology formations, or the direction and speed of underground water movement. Mr. Pirrie testified that he has an irrigation permit, but hasn't had enough water to be able to utilize it, that he has had years when stockwater wasn't available in the winter even in the absence of diversions by the Applicant, and that he is concerned that the Applicant's proposed diversion will accentuate the effects of the recent drought.

A.F. Muller, representing the estate of his mother Bertha Muller, testified that water availability problems have been experienced on the Muller property lately, and that he believes the Applicant's year-round appropriation of water will adversely affect the availability of stockwater on the property. He testified that the wells on the property are five to ten feet deep and provide stockwater, although the present tenants have to haul stockwater to outlying areas of the property. Mr. Muller further testified that surface water previously has gone dry at the Muller's points of diversion on Cold Spring Creek, but that subsurface water has always been dependable. He believes that the subsurface water enters the wells from an underground flow which comes from the area upstream, and that the Applicant's proposed use upstream could affect the subsurface supply to the wells.

9. The evidence in this matter indicates that the Applicant's proposed appropriation of additional groundwater would result in a very small lowering of the groundwater table in the immediate area of his diversion, given worst case scenario conditions (see January 22, 1986 Report by Brian Harrison), and in an unquantified reduction

in the surface water flow of Cold Spring Creek. The Applicant testified that he believes his proposed expansion will not affect the water rights of the Objectors to the point of causing harm, however.

The Applicant stated that his tile drain system is too far away from Objector Warner's well for his appropriation of water to have any effect on water availability at her point of diversion. He testified that, at the time of the field investigation of Mrs. Warner's complaint (see Department Exhibits 1, 2, and 3), he had walked between his closest tile line and the Warner well, and that there was water on the surface of the ground in between the two locations. He stated that he believes the lack of precipitation is the reason for the drop in water level which Objector Warner has been experiencing, since he had not pumped in 1986 when Mrs. Warner testified that her water system went dry.

The Applicant testified that he believes that his proposed water use will have some effect on Cold Spring Creek, because if he does not appropriate the water it goes underground and emerges "down lower" in springs. However, he does not think that downstream users will be affected to any great extent because the drainage area above his diversion is a small portion of the total drainage area, and because he believes the proposed storage will stabilize flows once water has seeped into the soil.

10. Brian Harrison, Department hydrogeologist, testified his calculations indicate that Objector Warner's water availability problems most likely do not stem from the Applicant's appropriation. Mr. Harrison testified that, based on a "worst case

scenario", the Applicant's project is causing a drawdown to the groundwater aquifer in the range of inches, not feet. (See January 22, 1986 Report by Brian Harrison.) He stated that the ground around Objector Warner's well was dry at the time of the October 23, 1985 site visit, although ground between the well and the Applicant's nearest tile line was wet on the surface. He also noted that the well experienced a recovery in water level at a time when the Applicant was still irrigating. Mr. Harrison testified that the facts indicate the Warner well problems are the result of lack of precipitation in the area, rather than of the Applicant's pumping.

Mr. Harrison stated that he believes the Applicant's appropriation has some effect on Cold Spring Creek downstream from the drain system, but that he cannot estimate what the effects might be, especially in the long term. In response to questioning, he agreed that there is a strong correlation between groundwater and surface water in the area.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria are met:

- (a) there are unappropriated waters in the source of supply:
 - (i) at times when the water can be put to the use proposed by the applicant,
 - (ii) in the amount the applicant seeks to appropriate; and
 - (iii) throughout the period during which the applicant seeks to appropriate the amount requested is available;
- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

4. The proposed use of water, irrigation, is a beneficial use of water. See MCA §85-2-102(2)(a), see generally Sayre v. Johnson, 33 Mont. 15, 81 P. 389 (1905).

5. The proposed means of diversion, construction, and operation of the appropriation works are adequate. (See Findings of Fact 4, 5, and 6.)

6. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

7. There are unappropriated waters in the groundwater source of supply, at times when the water can be put to use by the Applicant. (See Finding of Fact 7.) The record indicates that the full amount the Applicant seeks to appropriate is available only throughout part of the period (during runoff) during which the Applicant seeks to appropriate. During the remainder of the Applicant's proposed period of appropriation, the amount of water available fluctuates. However, the Applicant requires a permit for the full requested flow rate in order to be able to appropriate it when it is available (see Finding of Fact 7): although the Applicant testified that the requested rate of 500 gpm was intended to refer to the maximum pumping rate, his testimony indicates that 500 gpm is also the flow rate available for appropriation during periods of runoff.

8. The water rights of Objector Warner will not be adversely affected by the proposed appropriation.

The record in this matter provides substantial credible evidence that the water supply difficulties experienced by Hellen Warner are not the result of the Applicant's appropriation. (See Findings of Fact 9 and 10; January 22, 1986 Report by Brian Harrison.) Even assuming a worst case scenario of no recharge to the aquifer, the Applicant's appropriation is not likely to affect the Warner well water level more than a matter of inches. No evidence in the record suggests that this effect, in and of itself, will cause adverse effect to Mrs. Warner's right.

9. The Applicant has not provided substantial, credible evidence that the water rights of prior appropriators downstream on Cold Spring Creek will not be adversely affected.

The Applicant's appropriation has some effect on the surface water flow of Cold Spring Creek (Findings of Fact 8, 10), as the Applicant himself agrees. (See Finding of Fact 9.) However, the Applicant did not provide any evidence which suggests that the resulting reduction in stream flow would not aggravate these water shortages experienced downstream from his project.

It is possible that the stockwater rights of Objector Pirrie would not be affected by the reduction in flow, given the information on the record which shows that the drainage area above the Applicant's point of diversion constitutes a very small percentage of the total drainage area above Mr. Pirrie's point of diversion. (See Finding of Fact 9; Sundheim Field Report, page 4.) However, there is no evidence to show what proportion of the water which supplies the Muller water rights comes from above the Applicant, while there is evidence that the Muller property has experienced recent difficulty in obtaining even enough water for stockwater, both from Cold Spring Creek and from the shallow groundwater wells. (Finding of Fact 8; Sterling Sundheim's September 9, 1986 Field Report, page 4 and Figure 6.) Further, Objector Pirrie has not been able to exercise water rights for irrigation.

10. The Applicant's Application for a Beneficial Water Use Permit must be denied, due to his failure to provide substantial, credible evidence on each and every permit criterion. However,

since the denial is based on lack of information (although a determination has been made that the Applicant's proposed appropriation will affect the surface water flow, the extent of the effect to downstream surface water users of the Applicant's proposed groundwater appropriation has not been determined), the denial will be made without prejudice so that the Applicant may re-apply at such time as he may have sufficient evidence on the question of adverse effect. Alternatively, the Applicant may choose to work within the flow limit imposed by his Certificate of Water Right and file a new Notice of Completion to obtain additional volume and a storage right. (See July 23, Memorandum by Sterling Sundheim, page 3.)

Therefore, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Beneficial Water Use Permit No. 55880-40A by Daniel DeBuff hereby is denied without prejudice.

DONE this 9th day of November, 1987.

Peggy A. Elting
Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6612

CASE # 55880

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA §2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. MCA §2-4-621(1). Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was served by mail upon all parties of record at their address or addresses this 9th day of November, 1987, as follows:

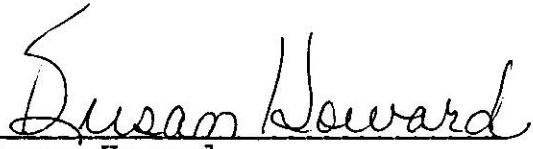
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